



**Limwaji v Republic (Miscellaneous Criminal Application E030 of 2024)
[2024] KEHC 14925 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E030 OF 2024**

**JN KAMAU, J
NOVEMBER 27, 2024**

BETWEEN

HUDSON MBULIKA LIMWAJI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was convicted of the main charge and sentenced to five (5) years imprisonment.
2. On 5th February 2024, he filed Notice of Motion application dated 4th February 2024 seeking a review of his sentence. He urged the court to consider the period of two (2) years and ten (10) months that he had spent in remand during trial from 1st July 2020 to 3rd March 2023 when he was arrested and sentenced respectively as part of his sentence. He relied on Section 333(2) of the *Criminal Procedure Code* and the case of *Bethwel Wilson Kibor v Republic* Criminal Case No 78 of 2009 (eKLR citation not given) where the court held that sentence should start from the date of arrest.
3. He relied on Article 50(2)(p) of the *Constitution* of Kenya and pleaded for sentence reduction. He pointed out that he was remorseful and a first offender.
4. He did not file any Written Submissions. The Respondent was not opposed to the said application and did not therefore file any written submissions. The Ruling herein is therefore based on his affidavit evidence.



Legal Analysis

5. The Applicant herein was sentenced under Section 8(4) of the [Sexual Offences Act](#). The same provides as follows: -

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.”

6. In the mind of this court, the Trial Court was very lenient for having sentenced him to five (5) years imprisonment.
7. Prior to the directions of the Supreme Court in [Francis Karioko Muruatetu and another v Republic \[2017\] eKLR](#) on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.
8. Notably, in the case of [Joshua Gichuki Mwangi v Republic \[2022\] eKLR](#), the Court of Appeal reiterated the reasoning in the case of [Dismas Wafula Kilwake v Republic \[2018\] eKLR](#) where it held that Section 8 of the [Sexual Offences Act](#) must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.
9. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the [Sexual Offences Act](#).
10. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case [Joshua Gichuki Mwangi v Republic \(supra\)](#) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.
11. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Applicant’s sentence. It had no option but to leave the said sentence that was meted against the Applicant herein undisturbed.
12. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was on going as provided in Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya). The said Section 333(2) of the [Criminal Procedure Code](#) provides that:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody (emphasis court)”.



13. This duty is also contained in the *Judiciary Sentencing Policy Guidelines* where it is provided that: -

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
14. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Abamad Abolfathi Mohammed & another v Republic* [2018]eKLR.
15. The Charge Sheet herein showed that the Applicant herein was arrested on 1st July 2020. He was sentenced on 3rd March 2023. He thus spent one (2) years eight (8) months and two (2) days in custody before he was sentenced.
16. A reading of the Trial Court’s Sentence showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

17. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 4th February 2024 and filed on 5th February 2024 was merited with regard to his prayer pursuant to Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) only.
18. For the avoidance of doubt, it is hereby ordered and directed that the period the Applicant spent in custody between 1st July 2020 and 2nd March 2023 be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
19. In view of the fact that once the said period has been taken into account he will have completed his sentence, it is hereby directed that the Applicant be and is hereby released from custody forthwith unless he is held for any other lawful cause.
20. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE

